

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

DIANNE E. CRITTENDEN,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH
SERVICES,

Respondent.

) Case No. DEMO-99-0026

)
) FINDINGS OF FACT, CONCLUSIONS OF
) LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair, and LEANA D. LAMB, Member. The hearing was held at the West Seattle Training Center, 4045 Delridge Way Southwest in Seattle, Washington, on January 31, 2001. GERALD L. MORGEN, Vice Chair, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant Diane Crittenden was present and was represented by Anita Hunter, Attorney at Law, of Parr & Younglove, P.L.L.C. Paige Dietrich, Assistant Attorney General, represented Respondent Department of Social and Health Services.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction for the causes of neglect of duty, inefficiency, insubordination, gross misconduct and willful violation of published employing agency or department of personnel rules or regulations. Respondent alleges that

Appellant engaged in unauthorized, non-work related and extensive personal use of state time and resources.

1.4 **Citations Discussed.** McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Anane v. Human Rights Commission, PAB No. D94-022 (1995), *appeal dismissed*, 95-2-04019-2 (Thurston Co. Super. Ct. Jan. 10, 1997); Countryman v. Dep't of Social & Health Services, PAB No. D94-025 (1995); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

II. FINDINGS OF FACT

2.1 Appellant Diane Crittenden is a Social Worker 2 and permanent employee for Respondent Department of Social and Health Services, Region 4, Seattle Community Services Division. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on September 23, 1999.

2.2 By letter dated August 9, 1999, John Atherton, Director of the Division of Assistance Program, informed Appellant of her demotion from her position as a Quality Control Specialist to a position as a Social Worker 2, effective August 25, 1999. Mr. Atherton listed the causes of neglect of duty, inefficiency, insubordination, gross misconduct and willful violation of published employing agency or department of personnel rules or regulations. Mr. Atherton alleged that Appellant engaged in unauthorized, non-work related and extensive personal use of state time and resources which included use of the internet and her state-owned computer.

1 2.3 Appellant has been employed by the state of Washington for approximately 19 years.
2 Appellant has been employed with DSHS since 1993. In 1997, Appellant promoted from her
3 position as a Social Worker to a position as a Quality Control Specialist. Appellant has no prior
4 history of corrective or disciplinary actions and her performance evaluations reflect that she was an
5 above average employee.

6
7 2.4 As a Quality Control Specialist, Appellant was assigned a personal computer and was
8 authorized to access the internet. Appellant's primary work responsibility was to conduct audits of
9 food stamp applications processed by financial eligibility workers. Appellant was required to
10 access the internet to perform research to verify the accuracy of information supplied by applicants.

11
12 2.5 Respondent has adopted policy 15.14, entitled Internet Use and Connectivity, which
13 prohibits the use of the internet for non-work related and personal purposes. The policy in effect at
14 the time Appellant was disciplined allowed employees to access the internet to retrieve non-DSHS
15 business e-mail messages as long as it did not interfere with the employee's normal job
16 responsibilities and did not result in additional costs to the state. The policy cautioned employees
17 to exercise good judgment in both the duration and frequency of such use. Employees were warned
18 that failure to comply with the policy could lead to corrective or disciplinary action. On October
19 27, 1998, Appellant signed an Internet Access Request and Agreement form indicating she read,
20 understood and would comply with Policy 15.14.

21
22 2.6 On April 14, 1999, Appellant contacted Rick Vernig, Computer Information Consultant 3,
23 because she was attempting to print several forms and the unit's printer was not operating properly.
24 While Mr. Vernig was fixing the printer, he discovered that Appellant was attempting to print
25 personal tax forms from the Turbo Tax program. Mr. Vernig determined that the complexity of the
26

1 print job caused the printer to go offline. Mr. Vernig observed that Appellant had also printed a list
2 of books off AOL.

3
4 2.7 The following day, Mr. Vernig contacted Appellant's supervisor, Cynthia Sleighter, and told
5 her of his concern with Appellant's personal use of state owned equipment to print personal
6 documents and forms. Mr. Vernig also reported an additional incident where he was working on
7 Appellant's state-owned laptop and discovered that Appellant had loaded the Turbo Tax software
8 onto the hard drive.

9
10 2.8 Mr. Vernig credibly testified that this incident was not the first time he fixed problems with
11 the unit's printer caused by Appellant's attempts to print personal documents. Mr. Vernig had
12 previously reported Appellant's use of the unit's printer to print non-work related documents to
13 Appellant's former supervisor. However, he did not believe the issue had been addressed with
14 Appellant because he noted that she continued to use the agency printer to print documents
15 unrelated to work.

16
17 2.9 On April 20, 1999, Ms. Sleighter initiated a Personnel Conduct Report (PCR) against
18 Appellant and began an investigation into Appellant's alleged misuse of state resources, specifically
19 Appellant's alleged access and use of the Internet and her alleged loading of the Turbo Tax
20 software onto her state-owned laptop.

21
22 2.10 On April 20, 1999, Ms. Sleighter met with Appellant and served her with the PCR. Ms.
23 Sleighter informed Appellant that she was going to take possession of her computer. Appellant
24 asked if she could delete a personal letter to her attorney off her computer. Appellant also asked
25 permission to copy work-related documents she had created onto a floppy disk. Ms. Sleighter
26 granted Appellant's request, and she accompanied Appellant to her office. Ms. Sleighter stood next

1 to Appellant and observed as Appellant began to copy documents and files onto a floppy disk. Ms.
2 Sleighter noted that Appellant began to delete files, and she asked Appellant to stop deleting them.
3 However, Appellant emptied the “recycle bin.”
4

5 2.11 During the course of the investigation, Claudia Conner, a former Network Administrator for
6 Respondent, examined Appellant’s computer. Ms. Conner concluded that on March 10, 1999 and
7 April 20, 1999, Appellant accessed non-work related sites approximately 137 times during work
8 hours.
9

10 2.13 Appellant testified that she accessed the internet for non-business related matters, because
11 she believed that some personal use was permissible. Appellant testified that she accessed the
12 internet to complete a Power Point presentation project she was assigned during an agency
13 approved computer class. Appellant testified that she believed accessing the internet for this
14 purpose was not inappropriate and that a majority of the sites reflected on her internet history are
15 related to the project. Appellant also testified that she was trying to hone her computer skills to
16 apply for other state jobs and felt that it was acceptable to work on the project during work hours.
17

18 2.14 Appellant denies that she was working on her taxes while at work and she testified that the
19 disk driver door on her home computer was broken and that she took the disk containing the tax
20 forms to work where she attempted to print them. Appellant testified she was unaware that she
21 loaded the tax program to her computer when she printed the tax forms.
22

23 2.15 Appellant testified that she subscribed to “Tip World,” a site that provided computer related
24 tips to subscribers. Appellant testified that she frequently accessed her personal e-mail address at
25 work to check the tips, and if applicable to work, she would print and share them with coworkers.
26

1 2.16 Appellant testified that there were days she never accessed the internet for personal use and
2 that on days that she did, she spent an average of 20 to 30 minutes reviewing sites. Appellant
3 further testified that she emptied the recycle bin based on Ms. Sleighter's consent that she delete the
4 letter to the attorney.

5
6 2.12 Respondent has established that Appellant loaded personal tax software onto her state-
7 owned computer, printed personal documents on the unit's printer, and accessed numerous non-
8 work related internet sites during work time, including, but not limited to, the following:

- 9 • amazon.com
- 10 • anti-social.com
- 11 • bigapple.net
- 12 • shopping.msn.com
- 13 • cartoonbank.com
- 14 • ebay.com
- 15 • jamtv.com
- 16 • rollingstone.com
- 17 • lowestfare.com

18 2.17 John Atherton was the Director of the Division of Assistance Programs when he demoted
19 Appellant. Prior to taking this disciplinary action, Mr. Atherton reviewed the PCR results,
20 reviewed the internet sites Appellant accessed, Appellant's statement, and the finding of
21 misconduct made by Barbara Bucski, Chief of the Office of Quality Assurance. Mr. Atherton
22 considered terminating Appellant, however, he felt termination was too severe based on Appellant's
23 tenure as a state employee and her history of positive work performance.

24 2.18 Mr. Atherton concluded that Appellant neglected her duty and was inefficient when she
25 accessed the Internet for personal purposes during work hours. Mr. Atherton believed that
26 Appellant abused state resources and that her use of the internet far exceeded any *de minimis* use
allowed by agency policy. Mr. Atherton also concluded that Appellant was insubordinate when she

1 failed to stop deleting files when asked to stop by her supervisor. Mr. Atherton further concluded
2 that Appellant understood the agency's policy on internet use, but that her actions violated the
3 policy. Mr. Atherton believed that the cumulative effect of Appellant's misconduct was egregious,
4 unwarranted and constituted gross misconduct. Mr. Atherton concluded that demotion was the
5 appropriate sanction based on the facts before him.

6 7 **III. ARGUMENTS OF THE PARTIES**

8 3.1 Respondent argues that Appellant used her computer in violation of the agency's policy.
9 Respondent asserts that Appellant accessed the internet for personal use, loaded a Turbo Tax
10 program onto her computer and attempted to print tax forms which jammed the unit's printer.
11 Respondent asserts that when Appellant's computer was being seized, she began to delete files and
12 that she continued to delete them despite being directed not to do so. Respondent argues that
13 Appellant does not use the Power Point program in the course of her duties and that the sites
14 Appellant accessed to complete her project were not business related. Respondent argues that
15 Appellant used her time in an unproductive manner. Respondent argues that the misconduct
16 occurred and that demotion is the appropriate discipline.

17
18 3.2 Appellant argues that her use of the internet was primarily business related. However,
19 Appellant asserts that her access of the internet for personal reasons was minimal. Appellant argues
20 that her use of the internet was purposeful and limited and resulted in no expense to the state or
21 personal benefit to herself. Appellant argues that she misunderstood the agency's policy regarding
22 use of the Internet and believed that limited personal use of the Internet was acceptable. Appellant
23 further argues that she is a 20-year state employee with no history of counseling or discipline and
24 that a permanent demotion is excessively punitive.

25 **IV. CONCLUSIONS OF LAW**

26

1 4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter
2 herein.

3
4 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting
5 the charges upon which the action was initiated by proving by a preponderance of the credible
6 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the
7 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of
8 Corrections, PAB No. D82-084 (1983).

9
10 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her
11 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't
12 of Social & Health Services, PAB No. D86-119 (1987).

13
14 4.4 Inefficiency is the utilization of time and resources in an unproductive manner, the
15 ineffective use of time and resources, the wasteful use of time, energy, or materials, or the lack of
16 effective operations as measured by a comparison of production with use of resources, using some
17 objective criteria. Anane v. Human Rights Commission, PAB No. D94-022 (1995), *appeal*
18 *dismissed*, 95-2-04019-2 (Thurston Co. Super. Ct. Jan. 10, 1997).

19 4.5 Insubordination is the refusal to comply with a lawful order or directive given by a superior
20 and is defined as not submitting to authority, willful disrespect, or disobedience. Countryman v.
21 Dep't of Social & Health Services, PAB No. D94-025 (1995).

22
23 4.6 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to
24 carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

25 4.7 Willful violation of published employing agency or institution or Personnel Resources
26 Board rules or regulations is established by facts showing the existence and publication of the rules

1 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the
2 rules or regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

3
4 4.8 Appellant was aware that the agency's computers and software programs, including use of
5 the internet, were to be used for work related purposes only. Furthermore, Appellant had a duty to
6 inform her supervisor that she wished to continue working on the Power Point project and received
7 permission to do so during work hours. Respondent has proven by a preponderance of the credible
8 evidence that Appellant accessed the internet during work time to explore information unrelated to
9 her job duties. Furthermore, Respondent has proven by a preponderance of the credible evidence
10 that Appellant loaded personal tax software onto her laptop computer and printed personal
11 documents using state owned equipment. Respondent has met its burden of proof that Appellant
12 neglected her duty and was inefficient when she used state owned computers and programs for non-
13 work related purposes during work time. Respondent has also met its burden of proving that
14 Appellant willfully violated Policy 15.14 when she repeatedly accessed the internet for personal
15 purposes during work hours. The amount of time, which Appellant estimated at 20 to 30 minutes
16 on the days she did access the internet, and number of sites Appellant accessed during work hours,
17 constituted more than a *de minimis* use.

18 4.9 Respondent has failed to meet its burden of proving that Appellant was insubordinate when
19 she deleted files from her "recycle bin" based on permission she received from her supervisor to
20 delete a personal letter and her reasonable belief that it was appropriate to delete the letter.
21 Furthermore, Respondent has failed to prove by a preponderance of the evidence that Appellant's
22 use of the internet was flagrant or that it adversely affected the agency's ability to carry out its
23 functions. Therefore, Respondent failed to meet its burden proving that Appellant's misconduct
24 rose to the level of gross misconduct.

25 4.10 In determining whether a sanction imposed is appropriate, consideration must be given to
26 the facts and circumstances, including the seriousness and circumstances of the offenses. The
penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to

1 prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the
2 program. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

3
4 4.11 In assessing the level of discipline imposed here, we find that a permanent demotion of a 20-
5 year employee with an exemplary work history is too severe. Based on Respondent's failure to
6 prove all the charges and the lack of any prior corrective or disciplinary action on Appellant's
7 record, we conclude that a one-year demotion is sufficient to prevent recurrence, deter others from
8 similar misconduct and to maintain the integrity of Respondent's program. Therefore, the
9 disciplinary sanction should be modified to a one-year demotion.

10
11 **V. ORDER**

12 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Dianne Crittenden is modified
13 to a one-year demotion.

14
15 DATED this _____ day of _____, 2001.

16
17 WASHINGTON STATE PERSONNEL APPEALS BOARD

18
19 _____
20 Walter T. Hubbard, Chair

21
22 _____
23 Leana D. Lamb, Member